

DOCUMENT RESUME

ED 130 328

CS 203 044

AUTHOR Cohodas, Nadine
TITLE Collision of the First and Sixth Amendments: Direct Restraints vs. Alternative Remedies. An Update.
PUB DATE 76
NOTE 40p.; Paper presented at the Annual Meeting of the Association for Education in Journalism (59th, College Park, Maryland, July 31-August 4, 1976)

EDRS PRICE MF-\$0.83 HC-\$2.06 Plus Postage.
DESCRIPTORS *Censorship; Court Doctrine; *Court Role; Courts; *Criminal Law; *Freedom of Speech; Higher Education; *Journalism; Legal Problems; Supreme Court Litigation

IDENTIFIERS *Fair Trials; *Free Press

ABSTRACT

The clash between the First and Sixth Amendments continues to be a major concern for both journalists and the courts. This paper reviews the major cases in the evolution of the "fair trial/free press" controversy from the "Irvin vs. Dowd" decision in 1961 to the Blackmun decision in 1975. The attempt is made to answer the question of when, and if, direct restraint of the press is necessary in a criminal proceeding; alternatives to this course, which can ensure protection of both First and Sixth Amendment rights, are examined. The analysis concludes with the recommendation of an unrestrained press in coverage of criminal trials, with the right to pursue information regardless of restrictions placed on sources. Control of sources within the criminal judicial system is advocated. Protecting individual rights under both constitutional provisions is, however, perceived as the responsibility of both the press and the judicial system. (Author/KS)

* Documents acquired by ERIC include many informal unpublished *
* materials not available from other sources. ERIC makes every effort *
* to obtain the best copy available. Nevertheless, items of marginal *
* reproducibility are often encountered and this affects the quality *
* of the microfiche and hardcopy reproductions ERIC makes available *
* via the ERIC Document Reproduction Service (EDRS). EDRS is not *
* responsible for the quality of the original document. Reproductions *
* supplied by EDRS are the best that can be made from the original. *

ED130328

U S DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRO-
DUCED EXACTLY AS RECEIVED FROM
THE PERSON OR ORGANIZATION ORIGIN-
ATING IT. POINTS OF VIEW OR OPINIONS
STATED DO NOT NECESSARILY REPRESENT
OFFICIAL NATIONAL INSTITUTE OF
EDUCATION POSITION OR POLICY

COLLISION OF THE FIRST AND SIXTH AMENDMENTS:
DIRECT RESTRAINTS VS. ALTERNATIVE REMEDIES

By

Nadine Cohodas
University of North Carolina

Accepted for presentation before the Law Division, Association for
Education in Journalism, meeting in annual convention at the University
of Maryland, College Park, Md., July 31-Aug. 3, 1976. The author
wishes to thank Norman Lefstein, associate professor of law, and L.E.
Mullins, associate professor of journalism, both University of North
Carolina, where the author is recent graduate of the Law School.

05 203 044

On November 20, 1975 Supreme Court Justice Harry Blackmun, sitting as circuit justice, ruled that the news media constitutionally could be prohibited from making public the prior record or confessions of a criminal defendant before his trial.¹ The decision marked the first time a Supreme Court justice upheld a prior restraint on the press during a criminal proceeding, and it came as the climax to a 15 year struggle by the courts to fulfill the command of the First Amendment--that government shall make no law abridging freedom of the press--and the command of the Sixth Amendment--that the accused be guaranteed a speedy and public trial by an impartial jury.

The struggle burst into the open in 1961 when the Supreme Court in Irvin v. Dowd reversed a state criminal conviction solely on the ground of prejudicial pre-trial publicity.² The ensuing years brought three other major decisions in the same vein,³ spawning four separate studies by the American Bar Association⁴ and creation by news reporters of a special committee to protect the media's interest in fair trial-free press clashes.

The Blackmun decision has focused attention on the essential question at the base of the ABA reports and the court decisions: Is a direct restraint on the press in a criminal proceeding ever necessary, or are other alternatives, perhaps not as certain to prevent pre-trial publicity, nevertheless adequate and less likely to undermine fundamental constitutional principles?

To answer this requires at least four major steps: defining why pre-trial publicity is a problem; identifying alternative remedies; analyzing the legality of direct press restraints; and finally examining the viability of less severe alternatives. Underlying all of this must necessarily be some notions about the First Amendment and the role of the press in fulfilling the purpose of that amendment.

I. The Problem

The case which came to Justice Blackmun naturally serves as a good illustration of how the fair trial-free press dilemma evolved. On Oct. 19, 1975 Ervin Charles Simants of Sutherland Nebraska was arrested and charged with the murder of six people and with the attempted sexual assault on one of those victims. During an October 22 preliminary hearing with a number of reporters present, testimony was taken from several witnesses including three who testified that Simants had admitted the killings. One of the three was a law officer. That same day the county court issued an order enjoining the press from reporting any information about the case other than as set forth in informal guidelines that had been adopted by some of the state's papers and the bar association. The court believed that release of the information could so prejudice prospective jurors that no trial could be held in Lincoln County, scene of the crime.

On October 27 the District Court terminated the county court's order and substituted its own. This order, eventually appealed to Blackmun, held that prior to empaneling a jury, the press could not report any confession to law officers, statements against interest by the defendant to third parties and information about the court's restrictions.

In Nebraska Press Association v. Stuart, Blackmun modified this order somewhat but he declined to stay that portion prohibiting publication of "certain facts that strongly implicate the accused. A confession or statement against interest is the paradigm,"⁵ Blackmun said. He explained his reasoning:

A prospective juror who has read or heard of the confession or statement repeatedly in the news may well be unable to form independent judgment as to the guilt or innocence from the evidence adduced at trial....There also may be facts that are not necessarily implicative but that are highly prejudicial as for example, facts associated with the accused's criminal record if he has one. Certain statements as to the accused's guilt by those associated with the prosecution might also be prejudicial. There is no litmus paper test available; yet some accommodation of the conflicting interests (of press and justice system) must be reached. The governing principle is that the facts are presumed to be in the public domain. The accused, and the prosecution if it joins him, bears the burden of showing that publicizing of particular facts will irreparably impair the ability of those exposed to them to reach an independent and impartial judgment.⁶

Blackmun sent the case back to the Nebraska Supreme Court so it could determine whether there would be irreparable harm to the trial process if the press restraints were lifted. Ten days later the state Supreme Court, following Blackmun's lead, decided the restraints were necessary. It prohibited publication of confessions or statements against interest made by the defendant to authorities or other third parties except the news media, and prohibited publication of "other information strongly implicative of the accused as the perpetrator of the slayings."⁷

The restraint on the press was lifted January 8, 1976 after the jury had been selected and sequestered. Simants was subsequently convicted of all the charges.

The Nebraska court's ruling, while certain to avoid the problem of prejudicial pre-trial publicity, creates a significant dilemma. It cuts sharply into the cherished territory of the First Amendment and goes against the current of every major Supreme Court decision over the past 30 years in the area of press restraints involving news reporting.⁸

Concern about prejudicing jurors before trial is not a twentieth century phenomenon. It has existed since the origins of the modern jury system, since the time jurors were picked precisely because they knew the defendant and the circumstances of a particular case.

Though having first hand information about a case was a positive attribute for any juror, this kind of prior knowledge was distinct from another kind that could be prejudicial. As a result jurors who might be biased could be excluded from a case. Lord Blackstone wrote that bias could be inferred if a juror were related to one of the parties, had an interest in the case or if he were "a party's master, servant, counsellor, steward or of the same society or corporation with him..."⁹

In addition Blackstone noted that concern eventually arose over too much familiarity with a case, even though no specific example of bias could be shown. Originally thought to be a boon, the fact that jurors came from the precise locale of the dispute was "overbalanced by another very natural and almost unavoidable inconvenience: That jurors coming out of the immediate neighborhood would be apt to intermix their prejudices and partialities in the trial of right." As a result the requirement that jurors come from the particular neighborhood of the accused was abolished, and they were required to come only from the county at large.¹⁰

Eliminating juror bias, of course, is built into the American constitutional system in the Sixth Amendment, guaranteeing a defendant the right to a speedy, public trial before an impartial jury. The key element of that phrase for discussing press restraints is the "impartial jury." Short of the

obvious examples Blackstone offers, when is a juror partial? What type of prior knowledge is likely to be prejudicial and how is the court to make that determination?

Scientific corroboration for the premise that prior knowledge means prejudice is not conclusive. As a result the Supreme Court in its major decisions dealing with prejudicial pre-trial publicity has relied on a standard of implied bias.¹¹

The first of those major decisions, the 1961 Irvin case, primarily emphasized the means to use in detecting bias among jurors. It was not aimed at establishing devices to avoid the prejudice beforehand. The court, through Justice Tom Clark, set out the manner in which the courts were to determine if the defendant had been tried before an unbiased jury, and set the standard to use in determining if the constitutional mandate of impartiality had been met.

Voir dire was to be carefully supervised by the trial judge who was to decide if jurors could lay aside their prejudices. The test, Clark said, was whether "the nature and strength of the opinion formed...raised the presumption of partiality."¹² By independently evaluating voir dire testimony of the empaneled jurors, the reviewing court was to decide whether sufficient indices of impartiality existed. Clark elaborated on this structure:

The theory of the law is that a juror who has formed an opinion cannot be impartial.

It is not required, however, that jurors be totally ignorant of facts and issues involved. In these days of swift and widespread and diverse methods of communication an important case can be expected to arouse the interest of the public in the vicinity and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the

presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.¹³

The court then undertook its own examination of voir dire and articulated a standard for declaring mistrials. They are to be granted if the trial was held where there was "a pattern of deep and bitter prejudice shown to be present throughout the community." Noting the statistics--most importantly that 370 of 430 prospective jurors entertained some opinion on guilt and that eight of 12 impaneled believed defendant was guilty--Clark stated, "...The finding of impartiality does not meet constitutional standards."¹⁴

Two years later in Rideau v. Louisiana the court had another opportunity to apply its prejudice standard. Shortly after his arrest, defendant Rideau was interviewed in his jail cell on TV, without an attorney, and flanked by the sheriff and two state troopers. In response to leading questions by the sheriff he admitted in detail the commission of a robbery, kidnapping and murder. The issue was whether the defendant received a fair trial before a jury that included three people who had watched the interview and two others who were sheriff's deputies in the local parish.

Rideau's attorney failed in his efforts to excuse these jurors for cause and had used up all of his peremptory challenges. The trial judge refused to grant a change of venue, a decision upheld by the state Supreme Court. The U.S. Supreme Court ruled that the refusal was a denial of due process.¹⁵

After another two years the Court, in Estes v. Texas again dealt with the publicity problem, but this time it focused not so much on the pre-trial aspect as on the effect of television in the court room. The court held that

televising of a criminal proceeding was inherently prejudicial and granted a new trial to defendant Estes.¹⁶

Finally in 1966, as if to say it had had enough, the Court in Sheppard v. Maxwell directly confronted the cause of the issues raised in Irvin, Rideau and Estes. Unlike these decisions which sought to redress the damage already done, Sheppard attempted to define methods to prevent damage in the first place.

First the court presented the problem. In this best known of all fair trial-free press confrontations the defendant was a Cleveland doctor on trial for murdering his wife. Selecting publicity highlights during the pre-trial stage the court noted:

For months virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition only three months before the trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people.¹⁷

The court further noted that a number of news articles "misrepresented entirely the testimony in the case," and that much of the information was willingly given to reporters by the prosecutor.

To curb such excesses the court made the following comments, destined to become the basis for post-Sheppard press restraints during criminal trials...

The trial court might well have proscribed extra judicial statements by any lawyer, party, witness or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests.... Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes

the press from reporting events that transpire in the court room. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition sequestration of the jury was something the judge should have raised sua sponte without request by the attorneys...If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their process from prejudicial outside interferences.¹⁸

The court at no point advocated direct restraints on the press although it seemed to leave open the possibility that these might be proper. "We have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism," Clark wrote, provided there was "no threat or menace to the integrity of the trial."¹⁹

At another point he said court procedures other than direct restraints on the press would have been sufficient so Sheppard did not "consider what sanctions might be available against a recalcitrant press..."²⁰ The obvious inference is that after one defines "threat or menace" and a "recalcitrant press" and concludes both exist in a particular case, then the press may be restrained.

Sheppard thus seemed to rule out the most extreme alternatives. Clearly, it rejected the do-nothing solution--the resort to post verdict remedies for any pre-trial prejudice. And at the same time it did not sanction the severe remedy of direct restraints on the press. Instead it suggested the middle ground, imposing restraints on the news sources--the prosecutors, defense attorneys and court personnel along with other procedures such as change of venue and sequestering the jury.

II. The Alternative Remedies

The major thrust of Sheppard did not fall on deaf ears. In 1968 and in 1975 the ABA advisory committee on Fair Trial-Free Press issued reports recommending what the bar could do to help curb pre-trial excesses. The 1968 Minimum Standards Relating to Fair Trial-Free Press in large part incorporated the suggestions in Sheppard. They recommended that prosecution and defense attorneys be prohibited from disclosing six categories of information before trial: prior criminal records, the possibility of a guilty plea, confessions, opinion as to guilt or innocence, performance or results of, or refusal to take any examinations or tests, and the identity, testimony or credibility of proposed witnesses.²¹

The standards also recommended that law enforcement agencies adopt guidelines for restricting release of the same six categories of information.²²

The standards did advocate allowing attorneys and police to release the name of the accused, the name of the victim, the fact of arrest, the charges, the date and time of trial, and "quotations from or references to the court's public record."²³

The regulations relating to attorneys have become part of the ABA Code of Professional Responsibility, DR7-107 A-C, and violation of the rule is a ground for censure and perhaps disbarment.

The 1968 report does not advocate any direct restraint on the press but notes instead:

....Particularly during the pre-trial periods, the imposition of restrictions might stifle desirable discussion of important public issues and discourage needed criticisms of official conduct.²⁴

The report also counsels against using contempt power to restrain the press except "in rare instances."

--Recommended Court Procedures--

The 1975 study is devoted exclusively to the use of restrictive orders. It is to be considered for adoption by the full ABA at its August meeting. The advisory committee again has stated that it "specifically recommends against the issuance of any orders which would impose direct restraints on the press."²⁵

Instead the study recommends that there be standing guidelines adopted to govern the pre-trial conduct of attorneys, law enforcement officers, judges and judicial employees "in connection with the release of information and pre-trial and trial publicity of criminal litigation." The guidelines are not designed to cover reporters but rather are for their "edification and guidance."²⁶

In addition, the report's major aim is development of procedures to insure that those affected by any order are represented in court before the judge issues it. The procedures would require the judge to give the public, including the press, notice of his intention to restrict access or comment. The public and press also would have the right to object. Findings of fact would be required to make sure the court first considered less severe alternatives. The report does not suggest any new methods for appealing restrictive orders, such as automatic stays pending appeal, or continuance of the proceeding until the appeal is resolved.

In addition to the ABA studies, bar association and a variety of press groups in 24 states have established guidelines similar to the ABA's for reporting on criminal trials. Compliance with the guidelines is voluntary--there is no enforcement mechanism by either group and there is no mandatory membership by lawyers or media in the unofficial organizations that developed the guidelines.

Many members of the press see these guidelines and bar measures as futile and even misdirected efforts. And many members, as Jack Landau of the Reporters Committee for Freedom of the Press has stated, "consider any prior restraint on publication to be unconstitutional except perhaps in the narrow category of a 'direct immediate and irreparable injury to or clear and present danger to the national security'..."²⁷

Any "prior restraint" sweeps broadly to include those practices "which have the effect of a prior restraint because they impose civil or criminal penalties for publication of court news or because they deny access to public court proceedings, to public court documents and to public persons involved in the criminal court system."²⁸ This view seems to advocate total freedom under the First Amendment for everyone connected with the criminal justice system, a view certainly curtailed in Sheppard. As Justice Clark outlined, a court can take a number of steps against those under its jurisdiction such as lawyers which have the effect of suppressing information. And in fact, judges would be considered remiss if they did not.

III. The Use and Legality of Direct Restraints

Despite the severity of direct restraints on the press and the alternatives suggested in Sheppard and by the ABA, the Reporters Committee found that at least 39 have been imposed between 1967 and 1975. The committee has not defined the scope of the restraints but attributes their use by courts to what they believe is a misunderstanding of Sheppard. An additional 63 restraints have been imposed on participants of trials and in 61 other cases court proceedings have been closed to the public and press.²⁹ None of the orders that have been appealed by the press has been upheld.³⁰

On its face, any direct restraint contravenes the First Amendment, and as a result "any system of prior restraint against the press comes to the Supreme Court with a heavy presumption of invalidity."³¹ Debate centers on when, if at all, the presumption can be overcome. On one side are those who take in essence an absolutist view--espoused most vigorously by Justices Black and Douglas. Black succinctly stated his proposition in a concurring opinion in New York Times v. U.S., the case dealing with publication of the Pentagon papers.

Both the history and language of the First Amendment support the view that the press must be free to publish news, whatever the source, without censorship, injunctions or prior restraints.³²

On the other side are those who believe as Justice Blackmun wrote in his New York Times dissent that the First Amendment "after all is only one part of an entire Constitution..."³³ To Blackmun and others when there is a clash between parties there must be a "weighing upon properly developed standards of the broad right of the press to print and of the very narrow right of the government to prevent."³⁴

Thus far the Court has said that the press may be restrained:

....only when the nation is at war during which time no one would question but that the government might prevent actual obstruction to its recruiting services or the publication of sailing dates or transports or the number and locations of troops...³⁵

Sheppard, as noted, hinted that another narrow exception could be created for criminal trials. Conjecture by Justice White in Branzburg v. Hayes, dealing with whether reporters can be compelled to reveal their sources to grand juries, seemed to suggest it more directly. Justice White wrote:

News men have no constitutional right of access to the scenes of a crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restraints are necessary to assure a defendant a fair trial.³⁶

This Branzburg suggestion is not without support. As Justice Blackmun asserted in his New York Times dissent, "First Amendment absolutism never commanded a majority of this court."³⁷ While that may be true, the government either state or federal, has yet to prevail before the full court in its effort to restrain the press in its reporting of news. These efforts were the New York Times case and Miami Herald v. Tornillo where the court struck down a Florida statute requiring newspapers to make space available to political candidates who were criticized either personally or on their official records.

In New York Times, the majority held that the government had not met its burden of showing that publication of the Pentagon papers would be so deleterious to the country that they could not be published. In Miami, the Court held that Florida's statute impermissibly impinged upon the First Amendment.

Chief Justice Burger, who dissented in New York Times, reasoned that the Florida statute, even though it did not prevent a paper from printing anything, had the same effect as a prior restraint. Burger closed the majority opinion with a statement offering his view of the role of the press:

A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper and the decision made as to limitations on the size and content of the paper and treatment of public issues and public officials--whether fair or unfair--constitute the exercise of editorial control and judgment. It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.³⁸

New York Times dealt with disclosing public officials, arguable deception about the nation's foreign policy. Miami involved a public official in the

political sphere. Neither involved a direct clash between two constitutional amendments. The question in Nebraska and other press cases is whether the same balance in favor of no restraints should be struck when the Sixth Amendment Rights of one criminal defendant are involved. Should the same historical arguments that have protected the press in these cases be sufficient to overcome the arguments that can be made on behalf of the single defendant? How significant is the theoretical loophole left in Sheppard and Branzburg when matched against the New York Times and Miami cases and against the detailed alternatives suggested in the same Sheppard case and the ABA reports?

In Times Picayune Publishing Corp. v. Schulinkamp, Justice Powell, sitting as circuit justice, apparently believed the balance weighed in favor of the press. He stayed a restrictive order that prohibited reporting of testimony given in hearings on pre-trial motions until after selection of a jury. The order also placed other selective restraints on reporting before and during trial. Citing New York Times and Miami, Powell said the order could not stand. He found the restrictions to be:

...both pervasive and of uncertain duration. They include limitations on the timing as well as the content of media publication. Moreover the court has available alternative means for protecting the defendant's right to a fair trial. 39

When the case came before the full court it was dismissed as moot.

The type of order in Nebraska seems to take into consideration the concerns of Powell. The order was limited in time--it applied until the trial began. And the order was limited in scope--the press was prohibited only from printing confessions or other statements "strongly implicative of the accused."

Looked at in this context, the Nebraska order seems harmless. But it is not. Restrictive orders, even limited ones, are analogous to being "a little

bit pregnant." Unless the pregnancy is terminated one becomes much more pregnant. Unless the new, narrow exception is effectively closed off, it will expand. New York Times columnist Anthony Lewis, who has chided the press for reacting "self righteously" and "hysterically" to the Blackmun ruling, nevertheless expresses this concern. He wrote in his regular New York Times column:

A decision confined to those (Nebraska) facts would be one thing-- a highly emotional crime, a real risk of community prejudice, brief and narrow press restraints. But if those can be stopped by injunction may not other courts not start enjoining stories alleged to be potentially libelous or damaging to national security?⁴⁰

He cited one case that already had gone beyond a criminal proceeding. In early December, 1975, a federal judge in Kansas City said he would consider banning publication of a newspaper column critical of anti-trust litigation unless the paper withheld it voluntarily. The column had already appeared in a trade paper.⁴¹

Overbroad restraints present a procedural as well as substantive problem. Under the current law, decided by the U.S. Court of Appeals for the Fifth Circuit in U.S. v. Dickinson, the press must obey a restrictive order even if it could not withstand even "the slightest breeze emanating from the First Amendment." Reporters recourse is to appeal the order or face contempt.⁴² The Supreme Court denied certiori in Dickinson. As a result, if reporters and editors believe an order is invalid and believe that the prohibited information is valuable to the reader they are faced with an acute dilemma. To obey the order and win on appeal is not likely to be helpful because the proceedings will be over before the appeal. To violate the order subjects reporters and editors to contempt and possible jailing.

A further and perhaps more important danger with direct restraints--even one as narrow as the Nebraska order--is that each serves as the seed for

substantially undermining the role of the press under the First Amendment.

Without an unrestrained press, Justice Black said in New York Times, the First Amendment cannot give the protections it is designed to give. He wrote:

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The government's power to censor the press was abolished so that the press would remain forever free to censure the government.⁴³

While in a particular case, such as Nebraska, the prohibited information may not be crucial to the public's understanding of the case, in other cases the prohibited information may be reflective of abuse within the system.

State and lower federal courts have recognized the importance of the press in covering legal proceedings, a factor noted in a special brief to the Supreme Court in Nebraska prepared by a number of major press groups. These include the New York Times, NBC and Philadelphia Newspapers, Inc. In a compilation of 17 state and lower federal court decisions from these courts since 1893, the press groups point out that a variety of limits sought to be imposed on the press have been held to be unconstitutional or otherwise void.⁴⁴

The Supreme Court has also recognized the significance of the press in covering trials. In Sheppard the Court concluded:

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny and criticism....⁴⁵

The role of the press, then, in large part is to search, to probe, to uncover, and the decision whether to publish the fruits of its labors is an editorial decision and must remain, as Justice Burger said in Miami, a matter of "editorial control and judgment." To understand any particular judgment

requires some understanding of the process of news reporting, a process alien to most non-journalists. Simply because a newspaper obtains information does not mean it will be published. Just as lawyers and judges are accustomed to balancing factors as they decide legal issues, so reporters and editors are accustomed to balancing factors as they decide whether to print a story. And when the factors are considered not all stories and all facts are printed.

A story concerning a criminal defendant is no different from any other. Though the story, at bottom, deals with the life of one individual it has a significant public aspect. As Sheppard noted, it reveals at minimum if law enforcement practices in a certain area are effective and applied with an even hand, and the story can expose for public view the workings of the criminal justice system. As the facts come to light they must be weighed to assess their importance in the context of what is happening. To a newspaper or radio or TV station the principal factor is the public's right and need to know. The potential effect of a story on court processes is at best a secondary consideration. In the context of a criminal trial the most serious problems arise when newspapers, radio or TV must decide whether to publish the prior background of the defendant or any confession he might have made because this information is considered to be the most prejudicial.

Publishing defendant's prior record is supported by the press because reporters and editors believe such information is an indication of how the laws are administered. Who the accused is may bear on how he is treated by the authorities. For example if an alleged leader of organized crime is arrested and freed on his own recognizance despite a number of past brushes with the law, then it can be argued that the public ought to know all of these facts so it can comment promptly on the propriety of the magistrate's action.

On the other hand if a first offender who is young and black is given high bail, the fact of his lack of a prison record is important in assessing the reasonableness of the magistrate's action.

Admittedly not every defendant's prior record raises the potential news items the hypotheticals suggest. It could be argued, therefore, that some defendants are harmed for no public purpose if their prior records have been revealed when this information is not newsworthy, and might even be kept out of evidence at trial. The response is that a newspaper could make the decision not to print the prior record precisely because it believes it is not newsworthy. But consistent with the Court's First Amendment opinions, it should be the paper's choice to publish or not. Furthermore, even if the prior record is published before trial and potential jurors read it, they could be excused during voir dire. Alternatively, if they were not excused, jury studies suggest that evidence brought out at the trial can negate the prejudicial effect on the jurors of the adverse publicity.

Confessions and other items that may be evidence in a case are different from prior records in one important respect. Their authenticity cannot be determined as easily as information about a prior record. Consequently, they ought to be treated differently by the press. The basic questions that any responsible reporter asks himself about this type of information relates to its reliability. Who gave it to him? Is he a reputable source? Can the information be checked? Unless the answer is 'yes' to those questions, the information should not be printed or broadcast. Obviously such restraint is not present in all cases, and irresponsible reporting occurs. In their Nebraska brief, the press groups acknowledge -- as would any reporter or editor -- that not all members of the press would reach the same decision on whether to publish. But

they argue that making these decisions is precisely what the Court means by the right to exercise editorial control and judgment.

The existence of verified confessions and their use or nonuse by authorities may be reported when this information arouses suspicion of unfair dealings. The Nebraska press groups illustrate this point persuasively in their brief:

If a sitting public official is accused of a crime, the press may well serve the public by writing about the hearing and the failure to introduce the confession at the hearing...And if a confession is made at a pre-trial hearing and the press has reason to believe--or to inquire into the possibility--that the other more powerful but thus far unaccused figures may be culpable, the public may well be served by continued public scrutiny of the bona fides of the confession. The last hypothetical, of course, is Watergate.⁴⁶

Despite all of the arguments against imposition of direct restraints, the theory still remains that another exception to the First Amendment can be created to go along side of the national security exception. A consideration equally as important as the legal hypothesis behind such restraints is whether they are, in fact, necessary to meet the command of the Sixth Amendment. An answer to this question, it seems, would help resolve the problem of whether prior restraints are supportable in law, for if it can be shown that less restrictive alternatives will suffice to insure a defendant a fair trial, then one of the important criteria for imposing a direct restraint--that irreparable harm occurs without it--cannot be met. What is required, therefore, is an examination of these other alternatives to determine if they, as well, are supportable in law and effective in practice.

IV. The Viability of Less Restrictive Alternatives

The alternatives to direct restraints mean either no restraints on anyone, even lawyers and police, or restraints only on those who are at the source of the information. The first proposition--no restraints on press, lawyers or police--was, prior to

Sheppard, the prevailing situation. The remedy for Sixth Amendment violations was granting new trials, a costly alternative. The press position that this policy should still prevail, while helpful to them perhaps, is simply not realistic. The courts after Sheppard are no longer going to accept this, at least as it applies to those directly under their control such as lawyers. Even the press groups do not seem to go this far in their Nebraska brief. Implicit in their discussion of Sheppard is acceptance of the control mechanisms set forth by Justice Clark.

But also implicit in their argument is recognition of reporters' right to keep pursuing information. They have a right to ask questions. They do not have a right to an answer. And it is at that point--the time for the answer--that the efforts of the courts and bar associations come into play. This is essentially the Sheppard view, later backed by the ABA in its reports, and it is these suggestions that require the most careful consideration. For this middle alternative of trying to police the source of information along with other procedural remedies seems to hold the most promise for giving a defendant a public and fair trial but preserving the essence of the press role under the First Amendment.

The most formalized means for controlling sources of information are the ABA recommendations relating to attorneys. As stated above the 1968 recommendations have become part of the Code of Professional Responsibility, DR7-107 (A) through (C), and violation of the rules in theory could lead to censure or disbarment. DR7-107 (B) is the key section, containing information prosecution and defense cannot make public, from the time of filing a complaint, information or indictment or arrest until the trial begins or the case ends without trial. The idea behind such a rule, of course, is that if the source of information

will not release what he or she has, then newspapers have nothing to print and radio and TV nothing to broadcast.

Clearly this concept raises two problems: infringing upon the First Amendment rights of the attorneys and undercutting the opportunity of the press to engage in full, free and public discussion. DR7-107 already has come under at least one legal attack. The Chicago Council of Lawyers claimed that the rule, along with less precise local rules based on DR7-107, was too sweeping in its proscriptions, violating the attorneys First Amendment rights.⁴⁷ In a detailed opinion dissecting the rules one by one, the Court of Appeals for the 7th Circuit upheld the constitutionality of DR7-107 (B)—the section proscribing comment on certain subjects.

Similar restrictions on law enforcement agencies, recommended by the ABA, have not been adopted formally in any state or national code, although the U.S. Attorney General has issued guidelines on release of information before trial for his own personnel. The ABA committee sees the law enforcement guidelines as virtually mandatory, noting that:

Study of the reported decisions together with the field work and newspaper content analysis leave little doubt that the overwhelming majority of potentially prejudicial pre-trial disclosures emanate from police and other law enforcement sources. Indeed, in many communities such disclosures have become almost routine. To restrict attorneys alone under these circumstances would be to lock the window while leaving the front door invitingly open.⁴⁸

Enforcement of the ABA recommendations by police officers, the court or bar associations has been spotty or non-existent. The bar, in particular, has had a poor record of keeping its own house in order. Prior to enactment of DR7-107, Canon 20 of the Canons of Professional Ethics existed, proscribing comments that may interfere with a fair trial and otherwise prejudice the due administration of justice. Canon 20 was almost never enforced but not

because of an absence of violations. A 1967 ABA-sponsored study by the Association of the Bar of New York City states:

...(I)nstances are legion and well known to the public in which prosecutors have leaked to the news media alleged confessions, statements that a case is open and shut...Certain defense counsels have persisted in trying⁴⁹ their cases in the press, over the radio and on television.

More recent examples of attorney excesses exist in the 1975 case of Joan Little, tried for the murder of jail guard Clarence Alligood in Washington, N.C., and in the pre-trial legal proceedings in robbery trial in early 1976 of Patricia Hearst. In both of these instances prosecution and defense repeatedly offered themselves to the press for interviews, often giving opinions and their explanations for what they believed was happening in court. There seem to have been clear violations of the ABA disciplinary rules, yet no authorities within the bar or criminal justice system warned these attorneys that such conduct might have professional consequences.

At present, there seems to be no enforcement of DR7-107, no threat of punishment to attorneys who violate it. There is likewise no threat of sanction to law enforcement officials or court employees who violate the ABA-suggested guidelines because most state and local agencies have not formally adopted them, let alone any disciplinary measures for their breach.

In theory strict enforcement of DR7-107 and adoption by law enforcement agencies of the ABA recommendations could curb pre-trial publicity, making stories harder to come by. This, however, is only the theory. Rarely do all sources dry up. Any reporter will admit that usually there is someone, some place with access to information who will divulge it, often to serve his own end. What's more, reporters will keep asking even if sources are initially unwilling to talk.

In its field study that preceded the Fair Trial-Free Press recommendations, the ABA committee verified that reporters will ask for information even when they know the sources should remain silent. The committee found that all of the newspapers questioned would continue to seek restricted information in at least some circumstances and three-fourths in all circumstances.⁵⁰ Once obtained, it is likely the information would be printed.

If such is the case, it would seem to support the Nebraska Supreme Court view--a direct restraint would be the only remedy to insure a fair trial. Furthermore, this situation suggests suggests that news reporters are rather unsavory people who actively encourage others to violate their ethics for the sake of a good story.

When separately analyzed, however, these two assertions do not necessarily follow. Despite the likelihood of leaks from sources, the other alternatives short of direct restraints can curb pre-trial publicity problems. This view comes from re-examinang the parties' concerns during pre-trial and the assumptions underlying them.

The principal concern, of course, is to prevent prospective jurors from being infected by prejudicial publicity before trial, and the assumption is that once the dangerous material--the prior record or alleged confession--is published, the damage has been done. It is important here to make the distinction between plain reporting of facts and propagandizing. The former is a simple statement, perhaps paragraph, listing the defendant's prior record. The latter is printing or broadcasting stories that go into great detail about past convictions, running the stories day after day and giving them prominent display or a good deal of air time. A juror subjected to that kind of barrage and who believes the accused is guilty, as in Irvin, is different from a juror who

admits on voir dire than he read someplace or other of defendant's prior record. Both kinds of jurors can be identified during voir dire, a process that is becoming as sophisticated as communications. No longer is voir dire simply prosecutor and defense attorney asking the routine questions, but it often includes questions prepared by psychologists and sociologists and analysis by body language experts to better categorize potential jurors.

The Supreme Court has supported the distinction in types of jurors and the method for identifying them. In Murphy v. Florida the Court upheld Justice Clark's assertion in Irvin that impartial jurors do not have to be ignorant jurors.⁵¹ In Murphy the Court refused to grant a mistrial because some of the jurors had known of the defendant's prior convictions. Distinguishing Rideau, Estes and Sheppard, in particular, the Court said:

The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.⁵²

After examining the voir dire the Court concluded that the voir dire "indicated no such hostility to petitioner as to suggest a partiality that could not be laid aside."

Assuming voir dire yields a contrary result and 12 impartial jurors cannot be found, or that the local atmosphere is too charged even to attempt finding jurors, a judge, as Sheppard suggests, can order a change of venue, a change of venire or continue the trial until emotions cool. Furthermore, once a jury is selected it can be sequestered until the trial is over.

Venue changes are controlled by statute and judges may argue that the changes they are permitted to make would not rectify the problem. Such was

the case in Nebraska. In its opinion the Supreme Court detailed the populations and presumptive news coverage in the counties where venue "might" be put, and concluded that a change would not be helpful.⁵³ These possible new trial sites were the eight counties that "adjoin"—touch in some way—Lincoln County, where the crime occurred. The Nebraska statute, 29-1301, states that venue may be changed because of prejudicial pre-trial publicity to "some adjoining county". There is no provision allowing for another removal if the first move is unsatisfactory.⁵⁴

North Carolina also states that venue should be changed to an "adjacent county," but the statute allows for a second change if the first is insufficient.⁵⁵ In addition case law gives the judge discretion to grant a change of venue in a county farther away from the original one if he believes it is necessary.⁵⁶ Joan Little, for example, was tried four counties west of the place of the crime, a move accomplished in one court proceeding.

Assuming that the Nebraska court felt barred by 29-1301, it does not follow that the statute must remain as it is. It would seem to be a simple and logical matter to amend venue statutes so that trials could be moved further away from the site of the crime than one county where such an accommodation would benefit the accused and do less damage to the First Amendment than would a direct restraint on the press.

Despite careful voir dire and change of venue, the argument may be made that publicity is so widespread an impartial jury is nowhere to be found. As one prosecutor put it, "You can't outrun Walter Cronkite."⁵⁷ This assertion is debatable. In the recent past, well known defendants in two trials were acquitted although there was a great deal of publicity before trial that cast them in unfavorable light. John Connally was acquitted of accepting a bribe and Maurice Stans and John Mitchell were acquitted of conspiracy to violate the Securities

and Exchange Commission laws. Both verdicts were obtained with no change of venue.

It must be emphasized that in Irvin and Rideau, where guilty verdicts and subsequent new trials were granted, the two major pre-trial safeguards, careful analysis of voir dire and change of venue, were not employed. In both cases state courts did not adequately assess juror responses before empaneling them and did not grant attorneys' requests to move the trials.

If a guilty verdict results despite careful voir dire, a change of venue and jury sequestration, the defendant is not without further remedy. He can win a new trial if an appellate court believes that prejudice against him remained. The issue then becomes whether the price of an unrestrained press is too high. Certainly it is cheaper in dollars and cents to restrain the press than it is to conduct pre-trial hearings on voir dire and venue, to pay bills for a sequestered jury and then possibly have a mistrial declared.

But dollars and cents should not be the only measurements. What is at stake is also an important though less tangible cost--the price of damaging a major tool in fulfilling the purpose of the First Amendment. This idea of an active press seems best to explain why reporters persist and probe--hound, if one prefers--sources for information. It is conduct consistent with their role in American society.

Highly questionable--even irresponsible--reporting sometimes occurs, but that is a problem the country has been willing to live with. Justice White concurring in Miami wrote:

The press would be unlicensed because in Jefferson's words '(W)here the press is free, and every man able to read, all is safe. Any other accommodation--any other system that would supplant private control of the press with the heavy hand of government intrusion--would make the government the censor of what the people may read and know.⁵⁸

The foregoing analysis leads clearly to advocating totally unrestrained press coverage of criminal trials. This includes the right of the press to pursue information regardless of restrictions on the sources of information such as attorneys. While advocating this view, it is also possible to accept attempts by the courts and bar associations to control those within the criminal justice system. The two positions are not inconsistent. It is a question of understanding roles. The press is outside the system looking in, probing, searching, exposing and explaining. Lawyers, judges, policemen are inside it, to administer it and make it work properly and fairly. If they are remiss in their duties, it is not the responsibility of the press to cover up the problems, but rather to expose them in the hope of fostering improvement.

The defendant--the locus of all this concern--is not without remedy as the struggle between press and court goes on. He can be guaranteed his Sixth Amendment rights through a variety of means less costly to society than silencing the press.

Footnotes

1. Nebraska Press Association v. Stuart, ___ U.S. ___, 96 S.Ct. 251 (1975)
2. Irvin v. Dowd, 366 U.S. 717 (1961).
3. Rideau v. Louisiana, 373 U.S. 723 (1963), Estes v. Texas, 381 U.S. 532 (1965), Sheppard v. Maxwell, 384 U.S. (1966).

4. Report of the ABA Advisory Committee on Fair Trial and Free Press "Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press" (Revised Draft, Nov. 1975).

Report of the ABA Advisory Committee on Fair Trial and Free Press, "Standards Relating to Fair Trial and Free Press" (Approved Draft, Mar. 1968).

Report of the Committee on the Operation of the Jury System, "The Free Press-Fair Trial Issue," 45 F.R.D. 391 (1968).

Report of the Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York, "Freedom of the Press and Fair Trial" (1967).

5. Nebraska, 96 S.Ct. 255.
6. Ibid., 255-6.
7. Nebraska Press Association v. Stuart, 63 Neb. S.C.J. 783, 216 N.W. 2d 764, (1975).
8. In Bridges v. California, 314 U.S. 252 (1941), Pennekamp v. Florida, 328 U.S. 331 (1946), and Craig v. Harney, 331 U.S. 368 (1947) the Supreme Court struck down contempt orders against newspapers for their coverage of trial proceedings before judges. The principle in these cases is best expressed by Bridges where Justice Black interpreted the test for restraining the press--whether publication would cause a "clear and present danger" to the administration of justice:

What finally emerges from (the test) is a working principle that the substantive evil must be extremely serious and degree of imminence extremely high before utterance can be punished...For the First Amendment does not speak equivocally. It prohibits 'any law abridging freedom of speech or of the press.' at 263.

In New York Times v. United States, 403 U.S. 713 (1971), the Supreme Court struck down an order prohibiting the Times from publishing the Pentagon Papers. In Miami Herald v. Tornillo, 418 U.S. 241 (1974), the Court struck down a Florida statute requiring newspapers to let politicians reply to adverse stories about them. And in Times-Picayune Corp. v. Schulinkamp, 419 U.S. 1301, Justice Powell, sitting as a circuit justice, stayed an order prohibiting press coverage of a criminal proceeding.

9. Sir William Blackstone, Commentaries of Laws of England, Book Three (Philadelphia, 1897), p. 1323.
10. Ibid., p. 1320

This aspect of Blackstone is often overlooked by members of the press who argue that the present attempt to insulate jurors from any pre-trial publicity is a perversion of the original concept of a juror. These press commentators seize on descriptions of the juror as the one who knew everything but fail to make the distinction Blackstone and others made—that some prior knowledge may be prejudicial, thus providing grounds for excluding a juror.
11. Donald M. Gillmor, Free Press and Fair Trial, (Washington D.C. Public Affairs Press, 1966) p. 216.
12. Irvin, p. 723.
13. Ibid., p. 722.
14. Ibid., p. 728.
15. Rideau, p. 726.
16. Estes, pp. 542-3.
17. Sheppard, p. 534.
18. Ibid., pp. 361-62.
19. Ibid., p. 350.
20. Ibid., p. 358.
21. 1968 ABA Approved Draft Standards 1.1, pp. 2-3.
22. Ibid., 2.1 p. 5.
23. Ibid., 1.1, p. 2.
24. Ibid., commentary, p. 151.
25. 1975 ABA Revised Draft Recommended Court Procedures, p. 9.
26. Ibid., p. 8.
27. Landau, "The Chill of the Communications Media," 62 A.B.A.J. pp. 55,57.
28. Ibid., p. 57.
29. Landau, 62 A.B.A.J., p. 57.
30. Ibid., p. 59.

31. New York Times, p. 713.
32. Ibid., p. 717.
33. Ibid., p. 761.
34. Ibid., p. 761.
35. Ibid., p. 726.
36. Branzburg v. Hayes, 408 U.S. 665, 684 (1972).
37. New York Times, p. 761.
38. Miami, p. 258.
39. Times-Picayune, p. 1308. Appeal dismissed as moot, 420 U.S. 985 (1975).
40. Anthony Lewis, New York Times, December 11, 1975.
41. Ibid. Claude Sitton, News and Observer, December 7, 1975.
42. U.S. v. Dickinson, 465 F.2d 496, 509 (1972).
43. New York Times, p. 717.
44. Brief for Nebraska Press Association as Amici Curiae at 26.
45. Sheppard, p. 350.
46. Nebraska Amici brief at 27.
47. Chicago Council of Attorneys v. Bauer, 522 F.2d 242 (1975).
48. 1968 ABA Approved Draft Standards, commentary, p. 98.
49. 1968 Association of the Bar of the City of New York Special Committee Report, p. 11.
50. 1968 ABA Approved Draft Standards, appendix A p. 180.
51. Murphy v. Florida, ___ U.S. ___, 95 S.Ct. 2031, 2036 (1975).
52. Ibid., 2036.
53. Nebraska v. Stuart, 236 N.W. 2d 794 (1975).
54. Revised Statutes of Nebraska 29-1301.
55. North Carolina General Statutes 1-84.
56. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.W. 2d 239 (1969).

57. Interview with Wake County, N.C. Prosecutor Burley Mitchell, November 2, 1975.

58. Miami, p. 260.

Collision of the First and Sixth Amendments:
Direct Restraints vs. Alternative Remedies

An Update

Nadine Cohodas
Chapel Hill, N.C.
July 13, 1976

On June 30 the U.S. Supreme Court unanimously struck down an order of the Nebraska Supreme Court that prohibited reporters from publishing certain information about an accused prior to his trial. The Court rendered the judgment with five separate opinions. The major one, written by Chief Justice Burger, said the Nebraska order was unsupportable on its particular facts, but the decision left open the possibility that a direct restraint on the press may be upheld in some instances.¹ Three of the justices-- Brennan, Stewart and Marshall--in an opinion written by Justice Brennan took the absolutist position--that a direct restraint on the press never would be permissible.² Justice White approached that view. In a one paragraph opinion he said there was "grave doubt in my mind" that orders such as Nebraska's "would ever be justifiable."³ Justice Powell, also writing briefly, said that the party seeking a restrictive order had a "unique burden" to meet and would have to show, to satisfy the justice, that the "threat" of an unfair trial "is posed by the actual publicity sought to be restrained."⁴ And finally, Justice Stevens said he generally agreed with Justice Brennan but was not prepared to rule out the legitimacy of a so-called gag order in extraordinary circumstances.⁵

Chief Justice Burger, joined by Powell, Rehnquist, Blackmun and White, indicated that a restrictive order could stand if the lower court imposing it made specific findings that less severe

alternatives were certain to be ineffective--that prospective jurors would in fact be prejudiced and that as a result a defendant's Sixth Amendment right to a fair trial and impartial jury would not be protected. The chief justice wrote:

We find little in the record that goes to another aspect of our task, determining whether measures short of an order restraining all publication would have insured the defendant a fair trial. Although the entry of the order might be read as a judicial determination that other measures would not suffice, the trial court made no express findings to that effect....⁶

And in closing his opinion Justice Burger said:

We cannot say on this record that alternatives to a prior restraint...would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require.

While the majority opinion does not immunize the press from future restrictive orders, it nevertheless is helpful in clarifying the issues that remain. These seem to break down into three major areas.

1. The Court suggests that the trial judge must compile some sort of record to sustain a gag order. Chief Justice Burger indicates that the record probably would have to include what reporters proposed to publicize, how widespread the dissemination would be, why it is prejudicial and specifically, that other measures short of a gag order--change of venue, change of venire (jury roll) or restraining court personnel--would be inadequate.

The Chief Justice seems to recognize the difficulty of this task:

When a restrictive order is sought a court can anticipate only part of what will develop that may injure the accused. But information not so obviously prejudicial may emerge and what may properly be published in these "gray zone" circumstances may not violate the restrictive order and yet be prejudicial.⁸

Will trial judges heed the justice's difficult guidelines? Or will they issue restrictive orders in any event, compiling the record the Chief Justice proposes but on facts that may not support the action.

Assuming a judge does issue an order, the problem of U.S. v. Dickinson is raised anew. This is the 1972 case from the U.S. Court of Appeals for the Fifth Circuit holding that the press must obey a gag order even if it appears on its face to be unconstitutional. The press may ignore the ruling only after an appellate court finds the gag order to be illegal. Failure to obey even an unconstitutional order results in contempt,⁹ creating a dilemma for the press. If reporters disregard the order they may be jailed. But if they heed it and if trial proceedings are not halted while the restraint is appealed, then important reporting may not take place.

The Fifth Circuit, following a procedure set out by the Supreme Court, said that the contempt convictions may be lifted if the appellate court finds the gag order unconstitutional and remands the case to the district court. This lower court can then decide whether in light of the illegal order the contempt convictions should be lifted.¹⁰

Dickinson, of course, is only a Fifth Circuit case and federal and state courts in other parts of the country are not bound by it.

However, the Supreme Court refused to review the decision, leading some to conclude that it could live with the result. This factor may give Dickinson added weight in other circuits.

2. In the body of his opinion Chief Justice Burger did not address the alternative of closing court proceedings altogether. Rather the emphasis was on restraining the press from reporting events occurring in open court. In a footnote, he suggested that pretrial proceedings may be closed "with the consent of the defendant when required...." However the justice added, "We are not now confronted with such issues."¹¹

The suggestion, though, may lead judges to circumvent gag order problems by simply closing proceedings as did the late Judge Oliver Carter during the pretrial stages of the Patricia Hearst case.

Perhaps the next round of litigation will include the question of when closing proceedings is required. Should the defendant unilaterally have the right to close them or is there a corresponding right of the public to know how the criminal process is being administered and to be allowed into court?

3. Justices Burger and Brennan state that less restrictive alternatives can be adequate. They point to curbing the flow of prejudicial information at its source by prohibiting lawyers, police and court personnel from talking to the press. One has to question the feasibility of that alternative in light of other Court action June 30. In two cases the justices refused to review

the contempt convictions of reporters who would not disclose their sources. Trial judges had put restraints on court personnel to protect the defendants' rights and had questioned the reporters to determine whether the orders had been violated.

An attorney who represented one of the press associations involved in the Nebraska case framed the issue in a succinct aphorism when he was interviewed June 30. The attorney wondered, he said, if the Court was not allowing by the back door what it had prohibited through the front.¹²

Footnotes

1. Nebraska Press Association v. Stuart, 44 U.S. Law Week 5149 (1976),
2. Ibid., 5159.
3. Ibid., 5172.
4. Ibid., 5173.
5. Ibid., 5173.
6. Ibid., 5156.
7. Ibid., 5158.
8. Ibid., 5157.
9. U.S. v. Dickinson, 465 F. 2d 496, 513 (1972).
10. Ibid., 513-4.
11. Nebraska, 5157.
12. CBS Evening News, June 30, 1976.